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REPLY BRIEF FOR APPELLANTS

Supreme Court of the United States

No. 297 **297**

JOHN M. DANIEL, AS ATTORNEY GENERAL OF SOUTH CAROLINA, L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF SOUTH CAROLINA, AND B. B. BROCKMAN, AS SHERIFF OF SPARTANBURG COUNTY, APPELLANTS,

versus

FAMILY SECURITY LIFE INSURANCE COMPANY, J. GORDON FLOYD, W. RUSSELL FLOYD AND WILLIAM E. LANFORD, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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INDEX

PAGE

I. Freedom of Contract and the Fourteenth Amendment 2

II. The Questioned Statute Aims at a Real Evil 3

III. The Constitutional Questions are unaffected by the Public Benefits Flowing from the Appellees' use of Favorable Mortuary Tables 5

IV. Recent Decisions on Due Process and Equal Protection 5

TABLE OF CITATIONS

	PAGE
Adams v. Tanner, 244 U. S. 590	2
Adamson v. California, 322 U. S. 46, 83	2
Borden v. Baldwin, 293 U. S. 194	2
Borden v. Ten Eyck, 297 U. S. 251	2
Central Lumber Co. v. South Dakota, 226 U. S. 157	4
Goesaert v. Cleary, 93 L. ed. 187, 189	5
Hammond Packing Co. v. Arkansas, 212 U. S. 322	3
International Harvester Co. v. Missouri, 234 U. S. 199	4
Jay Burns Baking Co. v. Bryan, 264 U. S. 504	2
LaTourette v. McMaster, 248 U. S. 465	4
Liggett v. Baldridge, 278 U. S. 105	2
Nebbia v. New York, 291 U. S. 503, 538	4
Olsen v. Nebraska, 313 U. S. 236, 85 L. ed. 1305, 61 S. Ct. 862, 133 ALR 1300	2
People v. Gillson, 17 N. E. 343	2
Smith v. Texas, 233 U. S. 630	2
Tigner v. Texas, 310 U. S. 141	3
United States v. Carolene, 304 U. S. 104, 154-2	2
Wafers-Pierce Oil Co. v. Texas, 197 U. S. 115	4
Watson v. Buck, 313 U. S. 387	3
Whitaker v. North Carolina, 93 L. ed. 201, 207	2, 6
Winters v. New York, 92 L. Ed. 656, 669	2

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The Appellees argue that the statute in issue deprives them of due process and equal protection because:

(1) its prohibition against undertakers owning and controlling life insurance companies and selling insurance arbitrarily interferes with their freedom of contract;

(2) there was no evil for the legislation to correct;

(3) the great public benefits flowing from the use by the Family Security Life Insurance Company of mortuary tables, more favorable to the public than those in general use, require the Court to invalidate the legislation. (Brief 20-21.)

I

FREEDOM OF CONTRACT AND THE FOURTEENTH AMENDMENT

The claim that a Legislature may not limit the freedom of individuals and corporations to contract has been rejected time after time by this Court. Here we are dealing with insurance and undertaking, both of which are peculiarly subject to public control. (Appellants' Brief 11-27.)

The authorities cited by the Court below (R. 138, 139, 143) and in Appellees' brief, as supporting a contrary view, are questionable precedents today.*

United States v. Carolene, 304 U. S. 104, 151-2, dealinging with the applicability of the Fifth Amendment and *Borden v. Baldwin*, 293 U. S. 194 construed in the light of the second opinion, *Borden v. Ten Eyck*, 297 U. S. 251 lend support to the constitutionality of the South Carolina statute here.

Smith v. Texas, 233 U. S. 630 and *People v. Gillson*, 17 N. E. 343 deal with the contract clause, not now argued by the appellees.

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*The decision in *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, was characterized as "an exercise of the powers of a super-legislature — not the performance of the constitutional function of judicial review" in Justice Brandeis' dissent. For doubt that his view prevails today, *Adamson v. California* (dissent) 332 U. S. 46, 83; *Winters v. New York* (dissent) 92 L. Ed. 656, 669.

Adams v. Tanner, 244 U. S. 590 has little vitality in the light of the holding in *Whitaker v. North Carolina*, 93 L. Ed. 201, 207. "Our holding and opinion in *Olsen v. Nebraska*, 312 U. S. 236, 85 L. Ed. 1305, 61 S. Ct. 862, 133 A. L. R. 1360, *supra*, clearly undermines *Adams v. Tanner*."

Our principal brief comments on *Liggett v. Baldridge*, 278 U. S. 105.

II

THE QUESTIONED STATUTE AIMS AT A REAL EVIL

Our principal brief (pp. 16-18) points to the State's policy prohibiting the payment of insurance in funeral services. The principal appellee, J. Gordon Floyd, was instrumental in perpetuating this policy in the 1947 Insurance Code. (Appellees Brief, p. 14.) The Appellees contend, however, that the State may not prohibit kindred burial insurance which is payable in cash through the undertaker. (Brief 20-21.)

The transcript of the hearing before the Banking and Insurance Committee of the South Carolina Senate (R. 82-133) shows clearly the evils that the Legislature was attempting to prevent by the enactment of the questioned statute.

This record shows that the appellees' funeral insurance plan would stifle competition. Such a result from the operation of a similar plan has been effected in a neighboring southern state. (R. 84, 87, 112.) Without the legislation undertakers would be forced to become agents of the insurance company or go out of business. (R. 85, 86, 93, 96, 122.) It would channel maturity benefits to certain undertakers. (R. 94, 99, 102, 103.)

In any community where a large percentage of the residents were covered by the type of "funeral insurance" sold by the appellee company, the competitive position of each funeral director would be practically frozen; free enterprise would be curtailed; centralized control of all funeral establishments in the state might be the result. This Court has many times upheld state anti-trust legislation against attacks under the 14th Amendment. *Tigner v. Texas*, 310 U. S. 141; *Watson v. Buck*, 313 U. S. 387; *Hammond*

Packing Co. v. Arkansas, 212 U. S. 322; *International Harvester Co. v. Missouri*, 234 U. S. 199; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Waters-Pierce Oil Co. v. Texas*, 197 U. S. 115. *Cf.* the following statement in *Nebbia v. New York*, 291 U. S. 503, at 538:

> The law making bodies have in the past endeavored to promote free competition aimed at trusts and monopolies. The constant interference with private property and freedom of contract has not availed the courts to set these enactments aside as denying due process.

A second evil minimized by this legislation is the tendency of funeral insurance written through undertakers to place the insurance agent-undertaker in an inconsistent fiduciary capacity. As undertaker it is to his interest to spend the entire policy proceeds on the funeral, as insurance agent he should be free to advise the beneficiary to retain the proceeds or a major portion thereof for necessary family expenses. *La Tourette v. McMaster*, 248 U. S. 465. The inadequate commissions for collecting premiums tempt the undertaker-agent to obtain his real compensation in the funeral bill. (R. 88, 95, 97.)

Certainly it was proper for South Carolina to decide that it was a wise thing to separate funeral directing and life insurance. By doing so it insures the beneficiary of free choice of funeral directors, it discourages monopoly conditions, and it leaves the insurance agent free to give the beneficiary impartial advice.

III

THE CONSTITUTIONAL QUESTIONS ARE UNAFFECTED BY THE PUBLIC BENEFITS FLOWING FROM THE APPELLEES' USE OF FAVORABLE MORTUARY TABLES

The appellees present a somewhat curious argument (Brief 20) that the statute is invalid because it will adversely affect the Family Security Life Insurance Company, which is using mortuary tables more favorable to policyholders than those used by other companies. There are two complete answers to this position:

First, the argument is addressed exclusively to the wisdom of the legislation and hence to the Legislature of South Carolina.

Second, the Family Security Life Insurance Company is not prohibited from using these mortuary tables. The statute in question merely prohibits that company and all other companies from writing insurance **through the undertakers**. So far as this legislation is concerned the Appellee company is free to write on the basis of any mortuary table it selects.

IV

RECENT DECISIONS ON DUE PROCESS AND EQUAL PROTECTION

Recent decisions of this Court have continued the trend toward upholding state experimental legislation in the economic field. In *Goesaert v. Cleary*, 93 L. Ed. 187, 189, the Michigan law limiting bartender licenses to males and the wives and daughters of male owners, was upheld against due process and equal protection arguments.

The Court's hesitancy in striking state economic legislation as a violation of due process is indicated in the recent decisions upholding state anti-closed-shop statutes, *Whitaker v. North Carolina et al.*, 93 L. Ed. 201, 208, 217-219:

> This Court, beginning at least as early as 1934, when the *Nebbia case* was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. United States*, *supra*, at 523-524, and *West Coast Hotel Co. v. Parrish*, *supra*, at 392-395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Respectfully submitted,

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